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THE TROUBLE WITH THE ADVERSARY SYSTEM IN A POSTMODERN, MULTICULTURAL WORLD

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I. INTRODUCTION

In this Essay I suggest the heretical notion that the adversary system may no longer be the best method for our legal system to deal with all of the matters that come within its purview. If late-twentieth century learning has taught us anything, it is that truth is illusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and, most importantly, complex. In short, there may be more than just two sides to every story. The binary nature of the adversary system and its particular methods and tactics often may thwart some of the essential goals of any legal system. This Essay argues that our epistemology has changed sufficiently in this era of poststructural, postmodern knowledge so that we need to reexamine the attributes of the adversary system as the "ideal type" of a legal system, and also reexamine the practice based on the premises of that system. Although some scholars justify the adversary system on the grounds that it satisfies a variety of truth and justice criteria,¹ I believe that consideration of those crite-

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1. See generally David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 93-111 (David Luban ed., 1983) [hereinafter *THE GOOD LAWYER*] (describing various justifications for the adversary system).

ria is, itself, contingent and must be historicized and reconsidered as our knowledge base changes.

In this Essay I argue that the adversary system is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system. My critique operates at several different levels of the adversary system: epistemological, structural, remedial, and behavioral. I suggest that we should rethink both the goals our legal system should serve and the methods we use to achieve those goals. For those who cleave to the adversary system,² I want to shift the burden of proof to them to convince us that the adversary system continues to do its job better than other methods we might use.

My critiques, to be further elaborated below, are briefly as follows: Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth,³ leaves out important information,⁴ simplifies complexity, and obfuscates rather than clarifies.⁵ More significantly, some matters—mostly civil, but occasionally even criminal, cases—are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution. The inability to reach a binary resolution of these disputes may result because in some cases we cannot determine the facts with any degree of accuracy. In other cases the law may bestow conflicting, though legitimate, legal rights giving some entitlements to both, or all, parties.⁶ And, in

2. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1982) (defining the lawyer's goals in competitive terms, such as winning); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) (exploring the impact of the conflict between moral obligations and duties to the client); MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990) (expressing a traditional view of the lawyer's role in the adversary system).

3. See MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) [hereinafter Frankel, *The Search for Truth*]; Philip Shuchman, *The Question of Lawyers' Deceit*, 53 CONN. B.J. 101 (1979); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

4. See, e.g., A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921 (discussing how the defense counsel in criminal cases may suppress the truth).

5. Consider how the "evidence" emerged in the O.J. Simpson trial. See, e.g., Elizabeth Gleick, *Is the End Nigh? All Sides Take Lumps As the O.J. Case Winds Its Way Toward the Jury*, TIME, Sept. 18, 1995, at 54 (discussing the presentation of evidence in the O.J. Simpson case).

6. See generally John E. Coons, *Approaches to Court Imposed Compromise—The*

yet another category of cases, human or emotional equities cannot be divided sharply.⁷

Modern life presents us with complex problems,⁸ often requiring complex and multifaceted solutions. Courts, with what I have called their "limited remedial imaginations,"⁹ may not be the best institutional settings for resolving some of the disputes that we continue to put before them.

Even if some form of the adversary system was defensible in particular settings¹⁰ for purposes of adjudication,¹¹ the "adversary" model employed in the courtroom has bled inappropriately into and infected other aspects of lawyering, including negotiations carried on both "in the shadow of the court"¹² and outside

Uses of Doubt and Reason, 58 NW. U. L. REV. 750, 753-54 (1964) (describing situations in which compromise is preferable to "winner-take-all" results); John E. Coons, *Compromise as Precise Justice*, in COMPROMISE IN ETHICS, LAW, AND POLITICS 190, 199 (J. Roland Pennock & John W. Chapman eds., 1979) (explaining how a system of apportionment is preferable when conflicting policy values should be recognized in the outcome of litigation).

7. For example, in custody cases both parents may have equally valid legal and emotional claims.

8. Consider how manufacturers of dangerous or toxic products have utilized bankruptcy proceedings to limit damages for their past acts and thus not only limit compensation for the injured, but threaten the economic security of present workers and others with whom such companies do business. See RICHARD B. SOBEL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

9. Statutes and common law limit the courts' "imaginations" to the powers of granting monetary damages or injunctions. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

10. Many have argued that the criminal justice system demands more adversarialism than the civil justice system and that ethics rules should reflect the differences. See, e.g., Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978) (distinguishing the ethical responsibilities of advocates from nonadvocate attorneys); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER*, *supra* note 1, at 150, 155-56 (discussing the adversary system in the context of criminal trials).

11. Monroe Freedman was among the first to argue that our adversary system is constitutionally mandated, residing in the Bill of Rights. See Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992). For other claims that the adversary system is constitutionally mandated, at least in criminal cases, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 564 (1986); Jay S. Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 857-66, 886 (1994).

12. The phrase is evoked by, but is different from, that used by Mnookin and Kornhauser. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow*

of it in lawyers' transactional work.¹³

Even in situations that call simply for factual determinations, the complexities of modern life—for example, the strong race issues implicated in several recent, notorious American cases¹⁴—contribute to the problematic result that different people will interpret the same “fact” in different ways.¹⁵ Because of such interpretive differences, therefore, I find not only the structures of the adversary system wanting, but also how we think about the people within those structures.

Modern scholars outside of, as well as within, law have questioned each of the following assumptions underlying the use of the adversary system—objectivity, neutrality, argument by opposition and refutation, appeals to common and shared values, and fairness.¹⁶ In my view, it is time for us to examine how these

of the Law: *The Case of Divorce*, 88 YALE L.J. 950 (1979).

13. For discussions of the inappropriateness of extreme forms of adversarialism in negotiation, see Menkel-Meadow, *supra* note 9; Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); cf. Eleanor H. Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. REV. 493 (1989) (discussing how the bargaining process influences ethical behavior); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (addressing the difficulty of devising appropriate rules concerning truthfulness in negotiations).

14. Many of these cases also demonstrate the power of binary thinking in black-and-white terms, rather than in the more complex multiracial, multicultural world in which we live. See, e.g., *California To Investigate Alleged Fuhrman Perjury*, WASH. POST, Nov. 28, 1995, at A 11 (discussing perjury accusations against a detective in the O.J. Simpson case); William Claiborne, ‘A Majority Black Jury Won’t Convict in a Case Like This,’ *Clark Says*, WASH. POST, Oct. 6, 1995, at A4 (discussing racial issues in the O.J. Simpson murder trial); William Hamilton, *Jury Declines To Convict L.A. Defendants on Last 2 Charges*, WASH. POST, Oct. 21, 1993, at A3 (reporting the jury’s verdict in the trial of Damian Williams and Henry Watson, the two men convicted of beating Reginald Denny).

15. See, e.g., David F. Hall et al., *Postevent Information and Changes in Recollection for a Natural Event*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 124 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (explaining how an eyewitness is influenced by multiple factors in his or her presentation of the events).

16. See, e.g., JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW* 144-46 (1983) (discussing the diverse and multicultural history of alternative dispute settlement institutions in the United States); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80-102 (1973) (explaining that “frequently the partisanship of the opposing lawyers blocks the uncovering of vital evidence or . . . distorts it”); Kenneth J. Arrow, *Information Acquisition and the Resolution of Conflict*, in *BARRIERS TO CONFLICT RESOLUTION* 259, 270 (Kenneth J. Arrow et al. eds., 1995) (explaining the deficiencies of the adversary model in information gathering and conflict

assumptions, which often are not "true," have affected our legal system. Lay people claim a crisis of legitimacy in the legal system, especially, for example, when the "race card" is deemed more important than any other factor in a trial,¹⁷ often not trusting jury verdicts. As scholars, we must take these criticisms seriously.

Multiculturalism, and all of the controversy that it has spawned in the universities,¹⁸ has at least reminded us that there is demographic, as well as epistemological, "positionality"¹⁹ and we do not all see things the same way. With a healthy respect for the new knowledge about knowledge, we need to examine whether the adversary system helps or hinders the way we sort out disputes, differences, misunderstandings, and wrongdoings.

Furthermore, the complexities of both modern life and modern lawsuits have shown us that disputes often have more than two sides in the sense that legal disputes and transactions involve

resolution); David W. Johnson & Roger T. Johnson, *Social Interdependence: Cooperative Learning in Education*, in CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 205, 221 (Barbara B. Bunker et al. eds., 1995) [hereinafter CONFLICT, COOPERATION, AND JUSTICE] (stating that "cooperative efforts are more effective than competitive and individualistic efforts").

17. The trials of Rodney King, Reginald Denny's assaulters, and O.J. Simpson all illustrate the use of the "race card." See *supra* note 14 and accompanying text. Former Los Angeles District Attorney Ira Reiner, during the O.J. Simpson trial, opined that if the majority-black jury heard the Mark Fuhrman tapes their disgust at the racism exhibited therein could lead to an acquittal, indicating that he believed race would become more salient than any of the factual evidence heard in the case. Jessica Seigel, *A Tough Decision for Judge: Relevant or Red Herring? Tapes Ruling May Decide Simpson Case*, CHI. TRIB., Aug. 31, 1995, at 1.

18. See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987) (criticizing the impact of political correctness on intellectual freedom in higher education); *DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* (Paul Berman ed., 1992) (discussing various facets of the debate over political correctness in higher education); ROBERT HUGHES, *THE CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* (1993) (discussing the relationship between culture and morality in American intellectual life); RUSSELL JACOBY, *DOGMATIC WISDOM: HOW THE CULTURE WARS DIVERT EDUCATION AND DISTRACT AMERICA* (1994) (analyzing the backlash against liberal education).

19. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (advocating positionality as an explanation of what it means to be "right" in the law); cf. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing the "essentialism" of "positionality" from particular demographic characteristics).

many more than two parties. Procedures and forms like interpleader, joinder, consolidation, and class actions have attempted to allow more than just plaintiffs' and defendants' voices to be heard, all the while structuring the discourse so that parties ultimately must align themselves on one side of the adversarial line or another. Multiparty, multiplex²⁰ lawsuits or disputes may be distorted when only two sides are possible. Consider all of the multiparty and complex policy issues that courts contend with in environmental clean-up and siting,²¹ labor disputes in the public sector,²² consumer actions,²³ antitrust actions,²⁴ mass torts,²⁵ school financing and desegregation,²⁶ and other civil rights issues,²⁷ to name a few examples.

Finally, scholars have criticized modern adversarialism for the ways it teaches people to act toward each other.²⁸ Although I share some of the critics' views regarding the incivility of lawyers,²⁹ I am more concerned that the rhetoric and structure of adversarial discourse prevent not just better and nicer behav-

20. Lon Fuller's essay on the structure of mediation reminds us that complex multiplex, multiparty disputes may belong in forms other than adjudication. See Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

21. See, e.g., *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994) (involving a suit by private corporation that incurred environmental clean-up costs against another responsible party to recover those costs).

22. See, e.g., *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) (involving a suit by nonunion employers to enjoin state agency from directing construction bidders to abide by labor agreement).

23. See, e.g., *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995) (involving a class action by members of an airline's frequent flyer program alleging violation of consumer laws).

24. See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (involving a civil antitrust complaint alleging violations of the Sherman Act).

25. See *Georgine v. Anchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted sub nom., *Amchem Prods., Inc. v. Windsor*, 65 U.S.L.W. 3338 (U.S. Nov. 1, 1996) (No. 96-270) (involving a proposed class action settlement of multiple asbestos claims).

26. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (involving litigation over a court order detailing a school desegregation remedy and the financing necessary to implement it).

27. See, e.g., *Lewis v. Casey*, 116 S. Ct. 2174 (1996) (involving class action by prison inmates alleging violations of constitutional rights).

28. See generally WOLFRAM, *supra* note 11, at 609-10 (discussing the relationship between adverse attorneys).

29. See, e.g., Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994) (suggesting that the decline in attorney civility may threaten the orderly function of our legal system).

ior,³⁰ but more accurate and open thinking.

A culture of adversarialism, based on our legal system,³¹ has infected a wide variety of social institutions. Although I will focus primarily on the legal system and legal ethics here, consider how debate, argument, and adversarialism have, in recent years, dominated journalism, both print and electronic media, political campaigns, educational discourse, race relations, gender relations, and labor and management relations, to name only a few examples.

After I critique the adversary system, you will wonder what I would substitute for it. It should be obvious that as a postmodern, multicultural thinker I have no one panacea, solution, or process to offer—instead, I think we should contemplate a variety of different ways to structure process in our legal sys-

30. I am on record as being "for" good and nice behavior wherever possible. See Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385, 407-19 (1992).

31. Although I do not have time or space in the present Essay to discuss the sources of adversarialism, it is important to note here that the legal system cannot be blamed for all adversarialism. For some review of the history of American adversarialism, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984). Formal rules of logic, and Aristotelian and classic philosophy, have long favored argument, dialectics, and debate as ideal ways of learning the truth. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 478-79 (1989). Marxism and other "isms" are based on the dialectics of reasoning of Hegel. See generally Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 283, 296, 298, 309 (Sandra Harding & Merrill B. Hintikka eds., 1983) (illustrating the intersection of Marxist and Hegelian thought) [hereinafter *DISCOVERING REALITY*]. At another level, athletic and military competition have long been valued by a wide variety of cultures. Indeed, I am not the first to argue that legal advocacy has borrowed too much from the practices and language of sports and war. See Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3 (1991); see also WOLFRAM, *supra* note 11, at 567; Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System*, 10 WISC. WOMEN'S L.J. 225 (1995). Judge Frankel notes the phrase "sporting theory" of justice was probably cliché when Roscoe Pound used it in his famous address in 1906. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404 (1906), reprinted in 35 F.R.D. 241, 281 (1964); Frankel, *The Search for Truth*, *supra* note 3, at 1033 n.5. Unfortunately, with the growing importance of computers in our lives, we may be entering an age of mandated binarism and artificial categories.

tem to reflect our multiple goals and objectives. For example, to achieve the goal of determining criminal guilt a different process may be required than is required for allocating money or human, parental, or civil rights. Sometimes other processes, such as mediation, inquisitorial-bureaucratic investigation, public fora or conversations, "intermediate sites of discourse,"³² private problem-solving (negotiation) or group negotiation, and coalition and consensus building³³ would resolve better the legal and other issues involved. I am thus suggesting variety and diversity for our legal process that will, in turn, require more diverse and complex thinking about which legal ethics would be appropriate in different settings.³⁴ Some might prefer to reform the adversary system to keep it protean enough to remain inclusive, as a model, for our entire legal system. In my own view, this will not be adequate. We need to explore alternative models of legal process and ethics that will better meet the needs of more complex postmodern, multicultural disputes and issues.

II. THE PITFALLS OF ADVERSARIAL / BINARY THINKING IN A POSTMODERN WORLD

Although I cannot, in this limited time or space, review the full history and sources of this country's particular approach to adversarialism, I note that the Anglo-American legal system did

32. See Lani Guinier & Susan Sturm, *Reflections on Race Talk* (1995) (unpublished manuscript, on file with author) for an eloquent description of how different forms and structures of process and conversation, such as within legal education, can produce different levels of revelation, honest discussion, and engagement, and ultimately "truth" and understanding.

33. See Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547 (1996).

34. I am currently engaged in this project myself as I look at what ethics are required in alternative dispute resolution settings that may differ from legal ethics in the adversary setting. See, e.g., Carrie Menkel-Meadow, *Ancillary Practice and Conflicts of Interests: When Lawyer Ethics Are Not Enough*, ALTERNATIVES TO HIGH COST LITIG., Feb. 1995, at 15 [hereinafter Menkel-Meadow, *Ancillary Practice*]; Carrie Menkel-Meadow, *Conflicts and Mediation Practice*, DISP. RESOL. MAG., Spring 1996, at 6 [hereinafter Menkel-Meadow, *Conflicts*]; cf. Geoffrey C. Hazard, Jr., *When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, ALTERNATIVES TO HIGH COST LITIG., Dec. 1994, at 147 (arguing that a law firm engaged in ADR practice should observe the rules of ethics). I currently chair the CPR Commission on Ethics and Standards in Alternative Dispute Resolution.

not originate the idea of oppositional presentations of "facts." Both classical philosophical discourse³⁵ and medieval scholastic disputations³⁶ exhibit the belief that contested, oppositional presentations of "facts" will best reveal the truth. At this point we should note quickly one important error in the defense of the legal adversary system drawn from this tradition. Whatever the flaws of oppositional thinking discussed below, philosophers and others using this form of logic, at least, are committed theoretically to a genuine search for the truth. This is not the motivating ideal when an ethics regime that places duty to the client at least as high, if not higher than, the duty to truth harnesses the adversary system to the legal system.³⁷ Although philosophers may seek the truth, lawyers seek to achieve their client's interests and to "win," which may entail simply obfuscating the other side's case—as in the "creation" of reasonable doubt in the criminal case—or leaving out important facts if they are deemed harmful. Even if the particular use of the oppositional/adversary model can be defended as a procedure of knowledge and truth-finding in other settings, as used in legal settings it lacks an important quality: the genuine search for truth.

35. As my colleague, philosopher Stephen Munzer, pointed out in a personal communication, however, the dialogues of Plato or Socrates were not "real" but were, rather, staged efforts to canvass and dispute particular ideas. Nevertheless, philosophers thought that we would best arrive at the truth by proposing and refuting ideas. See Janice Moulton, *A Paradigm of Philosophy: The Adversary Method*, in *DISCOVERING REALITY*, *supra* note 31, at 149.

36. The medieval universities sought knowledge by public "disputations" and debates. See generally ALFONSO MAIERÙ, *UNIVERSITY TRAINING IN MEDIEVAL EUROPE* 127-30 (D.N. Pryds trans. & ed., 1994) (discussing disputations). Consider that our modern "defense" of the dissertation derives from this tradition.

37. Many scholars, judges, and practitioners have discussed whether truth or other goals are the primary rationale for our adversary system. See, e.g., FRANK, *supra* note 16, at 80-102 (comparing the "fight" and "truth" theories); Frankel, *The Search for Truth*, *supra* note 3; Morley R. Gorsky, *The Adversary System*, in *PHILOSOPHICAL LAW: EQUALITY, ADJUDICATION, PRIVACY* 127, 131-35 (Richard Bronaugh ed., 1978) [hereinafter *PHILOSOPHICAL LAW*] (explaining how the rules of evidence inhibit fact finding); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). Although some argue that our system values "justice" or human and individual freedom and dignity over truth, others suggest that winning and victory are the real goals that compete with truth and justice. See DERSHOWITZ, *supra* note 2, at xvi-xvii; see also Thomas L. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

Despite the longevity and robustness of adversarialism as a mode of human discourse,³⁸ even some philosophers and epistemologists have questioned its value as the best way to understand the world.³⁹ It is this feature of postmodernism that I want to apply critically to the adversary system as we know it in the legal system. In general terms, a variety of philosophers, literary critics, art and architecture critics, social scientists, and legal scholars have questioned whether any "truth" exists out there that is knowable and stable.⁴⁰ Postmodernism expresses some skepticism, if not cynicism, in the belief that there are immutable, universal, global, and discoverable facts or interpretations of facts.⁴¹ Whether by literary deconstruction,⁴² feminist epistemology,⁴³ philosophical or linguistic decompositions of language,⁴⁴ or in our own field, critical legal studies' exposure of the indeterminacies of our laws,⁴⁵ the legacy of postmodernism is that truth is not fixed, meanings are "located" provisionally, not "discovered,"⁴⁶ and people who "find" truth,

38. Other modes of human discourse exist from which we could choose—the scientific method, for example, which, although it needs to "falsify" propositions with contrary data, does not set out to prove something by juxtaposing its opposite. Additionally, conversation, storytelling, mediation, and consciousness-raising are all more circular and less structured in method. Dangerous monologic (or false adversarial) forms like inquisitions and Star Chambers also exist. Finally, there are other, completely different legal systems—civil, mediational, and bureaucratic systems are examples.

39. See *supra* note 16.

40. See generally DISCOVERING REALITY, *supra* note 31 (discussing feminist philosophical perspectives illustrating deconstructionism); FISH, *supra* note 31, at 154-55 (noting the pervasiveness of deconstructionism).

41. For an excellent summary of the major contributions of postmodernism to social science from which much of the above discussion is drawn, see PAULINE M. ROSENAU, POST MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS (1991).

42. Literary deconstruction uncovers the suppressed meanings of a text that renders the text indeterminate.

43. Feminist epistemology seeks to uncover the biases of scientists. See, e.g., SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES (1991) (a feminist critique of science).

44. See Merrill B. Hintikka & Jaakko Hintikka, *How Can Language Be Sexist?*, in DISCOVERING REALITY, *supra* note 31, at 139.

45. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86-113 (1987) (elaborating the theories on which critical approaches to law in a variety of fields expose the contradictions of legal foundationalism).

46. These phrases are Rosenau's. See ROSENAU, *supra* note 41. Thus, there is

whether judges, juries, critics, or, yes, even scientists, have interests—social, economic, political, racial, gender—that affect how they see the world. In addition to interpretations of texts, meanings, and facts, postmodernists have questioned the very notion of a unified self having a stable set of characteristics, values, and attributes with which to process information.⁴⁷ Because we occupy multiple roles in modern society, being powerful in some—for example, the role of “father”—but subordinated in others—for example, the role of “worker”—the multiplicity of our social roles structures and filters our knowledge. Context—both present and our own personal and group histories—also deeply affects our knowledge. If we believe any of this (and I believe enough of it to consider the impact it might have on the finding of facts, the interpretation of law, and the production of “legal knowledge”), we must therefore ask how the legal system can assess truth and assign remedies confidently.

In an important book describing the significance of postmodernism for explaining social science’s knowledge, Pau-

“truth” in many cases—i.e., O.J. Simpson either did or did not kill his ex-wife and Ronald Goldman. Because we have only circumstantial evidence, jurors must “interpret” and give meaning to the evidence—therefore, their factual determinations will reflect greater variability. See Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate’s Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987). In my view, and as part of my critique of the adversary system, most trial advocacy texts (and I am a former trial advocacy teacher) still assume a far too rational fact-finding process. See THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (3d ed. 1992); J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* (2d ed. 1983). Practical lawyer guides are much more likely to attempt to deal with the emotional or “arational”—note that this is not “irrational”—aspects of fact finding and interpretation. For one attempt to deal with some aspects of “emotional” arguments, see ALBERT J. MOORE ET AL., *TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES* 80-89 (1996) (see chapter 9 on “silent argument”). Too many of the trial texts also treat all jurors as the same “average” or fungible juror, instead of recognizing the clear reality of widely disparate reactions to the same information by different people who may process “facts” through very different “filters” or “generalizations.” We have little that focuses on the “interpretative acts” of jurors, as analogous to the interpretative acts of readers in literature, despite all of the wonderful empirical jury studies. See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986) (analyzing critically research on juries); REID HASTIE ET AL., *INSIDE THE JURY* (1983) (describing empirical research on juries).

47. See MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992); Naomi Scherman, *Individualism and the Objects of Psychology*, in *DISCOVERING REALITY*, *supra* note 31, at 225.

line Rosenau has distinguished between more skeptical, nihilistic postmoderns who believe that "truth" is always partial, transitory, and uncertain, and affirmative postmoderns who instead seek to broaden and increase the methods of knowledge acquisition.⁴⁸ Affirmative postmoderns would, thus, include the recent spate of narrative writers in legal scholarship⁴⁹ who seek to increase the stories that are told and heard⁵⁰ in our legal system and appeal to empathy⁵¹ and affective, as well as rational,⁵² ways of knowing.

Both groups of postmoderns share a skepticism that truth can be "represented" accurately. This claim, which originates in art and literary criticism,⁵³ has some dangerous teaching for our rules of evidence and trial procedure. Although our various exclusionary rules are designed to protect against some distortions in "factual" representations, so that over-probative and prejudicial forms of evidence often are excluded, oppositional fact presentation itself may deserve criticism for its inherent need to involve extreme or distorted "representations" of past acts and motives that may be impossible to "re-present" in a courtroom.⁵⁴

48. See *supra* note 41.

49. See, e.g., ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993) (discussing the competing conceptions of the humanities as a method of criticizing the law's authority); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using personal narrative to discuss issues of race and law); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (a symposium on the use of narrative in the law); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (explaining how the movement to legal narratives is a rebellion against the abstract nature of traditional legal discourse).

50. For a look at the vigorous debate on the validation of these stories, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

51. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991)).

52. For an evocative argument that there are many ways (some of them gendered) of learning and "knowing," see WOMEN'S WAY OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (Mary F. Belenky et al. eds., 1985).

53. FISH, *supra* note 31, at 154.

54. Some of the postmodern attacks on knowledge would reject any legal system. If the truth is unknowable, then inquisitorial, and bureaucratic, and "alternative"

Let me illustrate the particular dilemma of oppositional, binary thinking at trial when linked with recent work in cognitive psychology and trial practice. If we take seriously the recent studies demonstrating that facts presented to fact finders are processed through "schemas," "filters," or common narratives,⁵⁵ then the presentation of two oppositional stories or conclusions may color how all of the facts are heard. Consider how the framing of a story by both sides then colors how each piece of evidence is interpreted. The oppositional story may work well when the fact finder has an off/on, guilt/innocence determination to make,⁵⁶ though it still carries the danger that all the fact finders will process incremental facts through a preexisting frame,⁵⁷ but will not work as well when polycentric factual findings, legal conclusions, and mixed fact/law questions are at issue: comparative negligence, business necessity defenses, excuse and justification in criminal law, and the best interest of the child, are a few examples. My argument here is that the "false" or "exaggerated" representation⁵⁸ of oppositional stories may oversimplify the facts⁵⁹ and not permit adequate consideration

systems of dispute resolution would fare no better in discerning facts.

55. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981) (describing the use of stories in legal judgments); JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990) (examining the tensions in the law with legal- (rule) and relationship-based "voices" of lay litigants).

56. Consider how you "filtered" each of the individual facts in the O.J. Simpson case given your "conclusion" about whether he was guilty or innocent. What would it have taken to change your mind? Consider this same question in light of different and more complicated issues: Does Microsoft have too large a share of the software market? What should be done if you think it does?

57. Here is my *de rigueur* cite to THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970), telling us that we can understand reality only through historically contingent paradigms, like the lawyer's oppositional stories, which do, on occasion, shift. *Id.* at 43-51.

58. What postmodernists call constructivism is the advocate's stock-in-trade.

59. Stanley Fish has gone so far as to say that all knowledge claims merely result from contextual and artificial agreements among professional communities. See FISH, *supra* note 31. So, if we cannot justify adequately the adversary system, and most philosophers have agreed that we cannot—see Luban, *supra* note 1, at 93-111—then the adversary system itself is the product of our professional "conspiracy" to perpetuate its existence. It has not been validated empirically. *Id.* at 118; cf. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*

of fact interpretations or conclusions that either fall somewhere in between, or are totally outside of, the range of the lawyers' presentations.⁶⁰ Indeed, one version of postmodernism could read the adversary system as totally and arbitrarily imposing order through its binary decision making process where no order exists, and where we cannot determine relevance rationally.⁶¹

An implicit, but sometimes explicit, aspect of all postmodernism is a skepticism about both objectivity and neutrality. This has serious implications for our adversary system, not only for the advocate's role, but for the so-called neutral, passive judge as well. Critical legal scholars have advanced most explicitly the skeptical argument of postmodernism by demonstrating both the law's linguistic contingency—its indeterminance—and its manipulation by particularized interests, such as economic, or class (in critical legal theory), or race-based interests in critical race theory, and gender-based interests in feminist legal thought.⁶² Most critical legal scholars' work has focused on the law and rules—the "texts" of the legal system.⁶³ The attacks on certainty, legal knowledge, and neutrality, however, have clear and dangerous implications for legal process, and for the adversary system.⁶⁴ A neutral judge, either as a

(1988) (analyzing the fairness of procedures and social processes); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (analyzing methods of conflict resolution in the context of social psychology).

60. Jury nullification may represent one effort to escape not just the law but also the need for binary fact determinations—maybe somebody was "a little bit guilty"—say, entrapped, but guilty, or, guilty but not responsible. Obviously, the more varied possibilities in equity also represent an effort to avoid the draconian effects of law's oppositional possibilities.

61. This view also coincides with chaos theory—that causality is not as linear as we modern science romanticists believe. Consider the arguments about "relevance" in the ever-expanding soap opera of the O.J. Simpson case and its aftermath—was what Detective Fuhrman said about Judge Ito's wife relevant to the guilt or innocence of Simpson? Where does the seamless web of the facts end?

62. In feminist epistemology more generally, philosophers of science have argued that even the construction of questions of "truth" in science have depended upon the "bias" of the masculinist view of reality. Consider the metaphors of "competition" and "survival of the fittest" and the struggle of the cell as examples. See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); EVELYN F. KELLER, *A FEELING FOR THE ORGANISM: THE LIFE AND WORK OF BARBARA MCCLINTOCK* (1983).

63. See, e.g., KELMAN, *supra* note 45, at 15-63 (chapter on rules and standards).

64. I am reminded of the article in *Time* magazine a few years ago that attempt-

passive umpire of a trial process or as a more active fact-finder, likely will be predisposed to favor one side of the story over the other or to favor his or her own interpretation of the story.⁶⁵ Party-initiated presentation of evidence might not uncover a judge's predisposition when the lawyers cannot learn the judge's own story. Some use this postmodern strategy to critique the false claims of objectivity and neutrality; others suggest that we simply should acknowledge the difference in values and accept that we may not have total unanimity over "fundamental interests."⁶⁶ The latter group of postmoderns argue that we should make explicit the appeal to fact finders' different values, beliefs, or emotions.⁶⁷ More than "two stories" may thus exist in the courtroom if litigants attempt to deal with the variety of values or emotional "frames" that could influence a fact finder.⁶⁸ In my

ed to describe the tenets of critical legal studies for a lay readership. See Richard Lacayo, *Critical Legal Times at Harvard; Of Two Minds in a Bitter Academic Feud*, TIME, Nov. 18, 1985, at 87. Pointing to the impact developments at Harvard have on the laity and other law schools, the article addressed a feud between Harvard professors over critical legal studies. The reporter stated that critical legal scholars viewed the law as the tool of the powerful (a fact well known to the person in the street). One could ask whether the laity retained more of a loyalty or belief in the adversary system and its process than law itself, until recently. Have years of TV shows like *Perry Mason* and *Law and Order* persuaded the public that the adversary system does find the truth and punish the guilty? Does the "person in the street" now have as much skepticism about the process of the adversary system, after a few well televised "miscarriages of justice"? (Or, maybe it is just Los Angeles. Why are all the bizarre trials there—Rodney King, Reginald Denny, the Menendez brothers, O.J. Simpson? Is L.A. the ultimate postmodern city? See MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* (1990)).

65. For evidence of this, see the Gender and Race Bias Task Force Reports completed in many states and several federal jurisdictions. See generally *Judicial Intimidation*, WALL ST. J., May 1, 1996, at A14 (discussing judicial bias task forces); Sandra Torrey, *Study of Bias in Courts Splits Judges*, WASH. POST, Feb. 28, 1994, at A1 (discussing also bias task force reports in various jurisdictions).

66. See generally KELMAN, *supra* note 45, at 64-85 (discussing different critical legal studies approaches to the subjectivity of value).

67. Indeed, some have argued that the split between emotion and rationality is itself a "false dichotomy." See Joan Cocks, *Wordless Emotions: Some Critical Reflections on Radical Feminism*, 13 POL. & SOC'Y 27 (1984); Carrie Menkel-Meadow, *Women As Law Teachers: Toward the Feminization of Legal Education*, in HUMANISTIC EDUCATION IN LAW: ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING 16 (Columbia University ed., 1981).

68. For an eloquent description of how the categories of law and the structure of legal process often suppress other "stories" and the truth, see Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs.*

view, this reflects the reality of life in a postmodern, multicultural world—a recognition that if “truth” is to be arrived at, it is best done through multiple stories and deliberations rather than through only two.⁶⁹ How this will be structured in a litigation system, which is still based on oppositional evidence presentation, remains to be seen.

I want to address briefly one other element of postmodernism: the explicit recognition that we reason in binary oppositions⁷⁰ with a hierarchy of values, usually subordinating one side of an opposition, as in male/female, white/black, rule/discretion, law/equity, market/family, etc.⁷¹ In postmodernism this is the method of deconstruction—the recognition that every “text” has its ambiguity, its negation, its opposition, its “silence.” In some versions, the idea is to reverse or re-situate the oppositions, which, of course, preserves them.⁷² In some forms, however, the purpose of deconstruction is to demonstrate that binary oppositions do not explain the world. Hierarchies of claims hide more than they reveal. Thus, many in Los Angeles hoped the jury would convict Rodney King’s attackers, not because it was “a white or black thing,” but because they were appalled by the beating.⁷³

G., 38 BUFF. L. REV. 1, 21-32 (1990) (telling the story of a client in a welfare hearing who refused to testify as her advocate suggested and instead told her own true story demanding justice from the heart where the law would not recognize her claim).

69. See *infra* notes 70-76 and accompanying text.

70. Postmoderns associated with this observation are Ferdinand de Saussure in linguistics, Jacques Derrida in literary criticism, and Jacques Lacan in psychoanalytic theory. See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally et al. eds. & Roy Harris trans., 1986); JACQUES DERRIDA, *ACTS OF LITERATURE* (Derek Attridge ed., 1992); JACQUES LACAN, *THE ETHICS OF PSYCHOANALYSIS* (Dennis Porter trans., 1992).

71. My personal favorite explication of the effects of this binary opposition in law is Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453 (David Kairys ed., 2d ed. 1991).

72. For example, the argument that some feminists make, that women are different and better than men, preserves gender differences. One side of the binary opposition is still better than another. See Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

73. Similarly, many hoped that the jury would convict the beaters of Reginald Denny, because of what they did, not because of a need to set an “oppositional”

Taken out of its postmodern context, deconstruction is a useful tool for those who criticize the adversary system because it exposes the distorting properties of both the "text" of adversarial argument⁷⁴ and of the literary texts that deconstructionists analyze. In concrete legal terms, and none of these claims are new or original to my argument, oppositional presentation often—though not always⁷⁵—distorts the truth⁷⁶ by making extreme claims,⁷⁷ by avoiding any potentially "harmful" facts, by

verdict to the travesty of the original acquittal in the King beating case. Note how these cases are known by the victims rather than by the perpetrators—neither Rodney King nor Reginald Denny was "on trial."

74. As someone who serves in a third-party neutral capacity, as an arbitrator and mediator, I am as frustrated as Judge Frankel was with the distortions and exaggerations made by counsel in pursuing their claims.

75. Consider the contrary informing principles of baseball arbitration, which asks two sides to make offers that are intended to be less extreme because the arbitrator must choose one without any modification. The theory, if not the practice, behind this principle of dispute resolution, is that it will encourage reasonableness. Some would argue that good advocates do this as well—if they hope to have a fact finder buy their whole story, they should try to tell the least-extreme, most-reasonable story.

76. For a nice catalogue, by a practicing lawyer, of the distortions in evidence presented through the adversarial method, see Gorsky, *supra* note 37. Gorsky lists evidence distortions as sources of incorrect evidence production or its inequality where: (1) there is a reluctant witness, whom both parties may be afraid to call; (2) there is an unawareness of a potential witness because of the lack of independent investigation; (3) there are inequalities in expert witness production as a result of economics; (4) witnesses are coached or "over-prepared;" (5) counsel is more inept than his opponent; and (6) a witness is inept—for example, the witness may be truthful, but fearful, and therefore very vulnerable on cross-examination. For my own arguments about how lawyers have to transform their clients' stories to meet the needs and requirements of the legal system, see Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 2 MO. J. DISP. RES. 25 (1985).

77. Many justify the adversary system as part of human evolution from trial by real combat to modern "bloodless" combat in the courtroom. See, e.g., LANDSMAN, *supra* note 31, at 8-10 (describing the early origins of the adversary system). Perhaps the distortions of modern verbal combat have outlived their usefulness and we can evolve to the next level—a combat-less legal system. For an interesting description of variations in lawyer aggressiveness, even outside of litigation, see Neil A. Lewis, *At the Bar: Wherein a 'New York Style Litigator' Is Cast As the Heavy in the Whitewater Affair*, N.Y. TIMES, July 28, 1995, at B18 (describing the variations in the New York lawyer who "fight[s] at all costs for a client" versus the Washington lawyer who is more concerned about "how things looked") (attributing remarks to Bernard Nussbaum, former counsel to the President). Lewis suggests that advice not to turn over documents to the investigators might be successful in defending a corporate wrongdoer but is not an appropriate tactic for a public official who must in-

refusing to acknowledge any truth in the opposition,⁷⁸ by limiting story telling to two, rather than allowing for a multiplicity of stories, by refusing to share information,⁷⁹ or, conversely, by strategically giving or demanding too *much* information,⁸⁰ by manipulating information (as in the "battle of experts"), by making the true look false (cross-examining a truthful witness) or the false look true (by offering false or misleading evidence or by actively "coaching" witnesses).⁸¹ Another common complaint about the adversary system demonstrates one of the claims made by deconstructionists. In litigation, the unequal resources of the parties will often determine the hierarchy of opposition. In an ideal and abstracted form, the adversary system clearly contemplates adversaries of equal skill and economic support; the result should not depend upon the resources or "skill" of the

spire trust and higher moral standards. *Id.*

78. Cognitive psychologists have named this phenomenon "reactive devaluation." We do not hear the validity of a claim or argument or offer made by "the other side" simply because it comes from the other side. This particular distortion of adversarial approaches to dispute resolution has become the focus of those studying negotiation and mediation. If we cannot hear the truth of what our opposition has to tell us, then a third party mediator can often reduce this distortion by being a more "neutral" bearer of offers or information. See Robert H. Mnookin & Lee Ross, *Introduction*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 16, at 3, 22-23; Robert H. Mnookin, *Why Negotiations Fail: An Exploration of the Barriers to Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 16, at 26.

79. See Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, at 5 (describing sanctions assessed against Bogle & Gates for failing to turn over discovery documents indicating medical warnings for a drug that caused serious injury to a child plaintiff); see also *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1075 (Wash. 1993). Many legal ethicists, including the distinguished Geoffrey Hazard, opined that our discovery system and our rules of legal ethics did not require the disclosure of these documents. See Brian J. Beck, *Rediscovering Discovery: Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 18 PUGET SOUND L. REV. 129, 137 (1994) (discussing Hazard's support of Bogle & Gates against a motion for sanctions).

80. John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989) (applying the analysis of game theory and the Prisoner's Dilemma to discovery abuse, based on oppositional strategic behavior by opposing litigants); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

81. Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988).

argument's representative, but on the merits of the argument.⁸² We all know, however, that "the 'haves' come out ahead."⁸³

Whatever the persuasiveness or merits of postmodernism's attack on truth or knowledge generally, its teachings are extremely problematic for the legal system.⁸⁴ Whatever problems may inhere in presenting only two stories, or in the impossibility of knowing what really happened, the legal system must find facts and make decisions if it is to maintain any semblance of order. The legal system's problem with postmodernism is the same as epistemology's: How can we evaluate anything and by what standards are we to judge anything? Even critical legal scholars like Joel Handler⁸⁵ thus acknowledge that even if no single "procedure . . . [has] access to truth or reality, including science,"⁸⁶ we must use some measure to assess facts and to act.⁸⁷ For Handler, as for others,⁸⁸ that "something" is a nonfoundational pragmatism: "[T]he test of knowledge is efficacy."⁸⁹ Handler, however, like other pragmatists, and I include myself in this group,⁹⁰ envision a greater multiplicity of stories

82. This is what happens when the fault lies with the man and not with the art (i.e., the quality of representation). See Martin P. Golding, *On the Adversary System and Justice*, in PHILOSOPHICAL LAW, *supra* note 37, at 98, 112 and PLATO, GORGIAS (Terence Irwin trans., 1979) for arguments about the morality of the "bought" or partisan rhetorician. In postmodern parlance, the case turns on the performance or "performativity" of the advocate, rather than on the "facts," thereby demonstrating once again that "truth" in the legal system is neither objective nor necessarily rational.

83. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

84. Indeed, one might suggest that the label of "nihilists" attached to the critical legal scholars by Paul Carrington and others (see Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984)) represents the very fear of the validity of some of these arguments—if they are persuasive they deal very significant blows to the entire structure of law and the legal system.

85. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

86. *Id.* at 703.

87. *Id.* at 722 ("[E]ven local power cannot be confronted with a comprehensive political and economic plan.").

88. Such as myself.

89. Handler, *supra* note 85, at 702.

90. For explorations of the Deweyan sources of this modern legal pragmatism, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT*

being told, of more open, participatory, and democratic processes, yielding truths that are concrete but contextualized, explicitly focused on who finds "truth" for whose benefit.⁹¹ The feminist epistemologist, Sandra Harding, has called this "strong objectivity" when the interests of truth finders and the questions that they ask and answer form part of the description of the "truth."⁹² In the final section of this Essay I explore how these observations may help us both to reform some of the defects of the adversary system and to open up and more radically transform our whole legal process. This has obvious implications—requiring further exploration—for our core concepts of legal ethics. First, however, I want to air some more complaints.

III. THE LIMITED REMEDIAL POWER OF ADVERSARIALISM

What our adversary system, as exemplified by courts, permits as resolutions to disputes makes the structure of adversary argument—limiting cases to two "sides," or a limited set of other-party arguments through the use of joinder, interpleader, and subclasses—more problematic. I have argued at length elsewhere that courts that are empowered to grant money damages, guilty or not-guilty verdicts, and injunctions, which are more often negative than positive, greatly limit what results an adversary argument can achieve.⁹³ Although I am mindful of the fact that parties are always free to exit the system and settle for their own more tailored solutions, the truth is that the limited,

(1988); CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 195-209 (1989) (discussing the views of Richard Rorty); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752.

91. Handler, *supra* note 85, at 712-18.

92. HARDING, *supra* note 43; Sandra Harding, *Introduction: Eurocentric Scientific Illiteracy—A Challenge for the World Community*, in *THE RACIAL ECONOMY OF SCIENCE: TOWARD A DEMOCRATIC FUTURE* 1, 17-19 (Sandra Harding ed., 1993). "Democratic values, ones that prioritize seeking out criticisms of dominant beliefs from the perspective of the lives of the least advantaged groups, tend to increase the objectivity of the results of research." *Id.* at 18. Note the structural parallel in this argument to John Rawls's "veil of ignorance" in political philosophy. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1973).

93. Menkel-Meadow, *supra* note 9, at 768-83.

remedial imagination of lawyers who bargain "in the shadow of both the court and the law" often constrain settlements.⁹⁴ Without rehashing my earlier arguments here, I want to suggest that we should think carefully about which cases require binary solutions (and I believe that some cases require such solutions) and which do not. At the same time, however, we need to examine why this one mode of dispute resolution still so thoroughly dominates our thinking about legal problem solving.⁹⁵ Whatever efforts have been made to expand the scope of processes and remedies recognized by courts,⁹⁶ the co-optation of these processes by determined advocates continues.⁹⁷ As I have argued elsewhere,⁹⁸ expanding the stories, the interests, the issues, and the stakes actually enhances the likelihood of making "trades" and finding other creative solutions to problems so that we can minimize contentious argument and satisfy more party needs.⁹⁹ To accomplish such a reframing of attitudes and thought processes will require a great deal of re-education and reorientation; indeed, major cultural, not just ethical, change among lawyers is needed.¹⁰⁰ Thinking creatively is not neces-

94. *Id.* at 775-76.

95. This examination could also extend to business and interpersonal relationships as well as life in general. For example, see the interesting but depressing example of application of competitive thinking, derived from game theory, to a wide range of human problem solving in AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS AND EVERYDAY LIFE* (1991).

96. See, e.g., Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (multidoor courthouses and other efforts to enact Frank Sander's ideas about multiple processes).

97. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1990). My personal favorite co-optations include a letter written by one advocate to his adversary that stated, "I have filed an ADR *against* you," and a recent continuing education program for defense lawyers that offered advice on "winning in ADR and negotiation." ADR For the Defense, Defense Research Inc. (Program held in San Francisco, Sept. 21-23, 1995).

98. Menkel-Meadow, *supra* note 97, at 12.

99. My favorite illustration of nonadversarial dispute resolution comes from a UCLA faculty cocktail hour at which several of my colleagues picked at the same bowl of cocktail mix. None of us were in competition as some chose pretzels, others nuts and others WheatChex—we wore down the bowl cooperatively and with all of our needs being met. We valued different things. The more "stories" and interests we get on the table, the more likely we can arrive at a mutually agreeable solution, by finding complementary, rather than competitive, interests.

100. See Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating*

sarily the same process as thinking critically or analytically; the negative and reactive thinking produced by adversarial argument may limit more open ways of conceptualizing solutions to problems.¹⁰¹

I will heretically suggest that even some criminal matters—a category of cases most often understood as paradigmatically requiring binary solutions followed by punishment—might be susceptible to other processes and remedies such as Victim-Offender Mediation,¹⁰² which attempts to create a guilt-imposing relationship between offenders and victims of some small crimes to encourage restitutionary remedies rather than punishment. If we are to defeat the hold that crime has on us then we must also broaden and increase our responses¹⁰³ and searches for solutions, especially where there is not enough room for all at the inn—the prison.¹⁰⁴

In the civil arena, where I have focused my work, we must consider the cases that do not lend themselves easily to right or wrong answers¹⁰⁵ or to more binary solutions. Often, third-party-imposed solutions, such as those imposed by courts, do not deal with causes underlying ongoing conflicts or disputes, espe-

ADR in the Law School Curriculum, 46 SMU L. REV. 1995 (1993).

101. See, e.g., JAMES L. ADAMS, *CONCEPTUAL BLOCKBUSTING: A PLEASURABLE GUIDE TO BETTER PROBLEM SOLVING* (1986) (explaining how to improve problem solving skills); MARTIN GARDNER, *AHA! AHA! INSIGHT* (1978) (discussing problem-solving).

102. See, e.g., ROBERT B. COATES & JOHN GEHM, *VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM-OFFENDER RECONCILIATION PROGRAMS* (1985) (describing and evaluating Victim-Offender Mediation); Jennifer G. Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (explaining the history and development of Victim-Offender Mediation and criticizing it for placing excessive control in the victim's hands).

103. Additionally, systemic efficiency—remedies, treatments, and processes to deal with the crushing criminal caseload—must be addressed to fashion complete remedies.

104. Obviously, this implicates more important and complex questions of criminal law and policy. Difficulty lies in learning who benefits from such perceived "more lenient schemes."

105. Winning may not be everything; often a short-term win may be followed by long-term resentment and efforts to execute a judgment or monitor an injunction. For example, segregation is wrong, but we now wonder whether busing was the best or only solution. Some groups had tried to look for other solutions earlier. See, e.g., Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487-88 (1976) (citing alterations to the racial balance remedy, including equality of financing).

cially if personal or relationship issues are at stake—this includes commercial as well as civil rights matters. Third-party-imposed solutions, therefore, may not endure. The courts, to their credit, have realized this, though not without a vast outpouring of scholarship and criticism of the difficult road courts take when they attempt to order more complex remedial measures.¹⁰⁶ Most recently, courts have supervised other kinds of dispute resolution, particularly in class action settlements of consumer and antitrust cases¹⁰⁷ and mass torts.¹⁰⁸ We must look for ways to preserve limited funds so that they are fairly distributed to all deserving claimants as well as look for opportunities in which people may desire things other than, or in addition to, monetary relief.¹⁰⁹ Greater possibilities of remedy and more creative “remedial” imaginations should thus affect the choices we make about what processes to use. Adversarialism may greatly restrict what can be accomplished.

106. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-16 (1976) (stating that continual judicial oversight is necessary if justice is to be done in an increasingly regulated society); Stephen Yeazell & Theodore Eisenberg, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 474-94 (1980) (arguing that institutional litigation, in which courts are asked to oversee the operation of public institutions, has support from older judicial traditions).

107. Here, my personal favorite was when I received books from Harcourt, Brace & Jovanovich, instead of cash, in settlement of an antitrust case involving overcharges in Bar Review courses. Such a settlement is not unlike the coupons for air fare discounts recently received in settlement of an airline antitrust action. See *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993). These types of responses illustrate how “in-kind” or other forms of compensation are not zero-sum—the books and coupons give some benefit to the defendants, decreasing their cost for our recompense.

108. As in the Virginia bankruptcy court’s supervision of the Dalkon Shield Claimants’ Trust ADR program, see *Dalkon Shield Claimants’ Trust v. Baker* (*In re A.H. Robins Co., Inc.*), 197 B.R. 587 (Bankr. E.D. Va. 1995), and the now-rejected settlement of the breast implant litigation. See *Lindsey v. Dow Corning Corp.* (*In re Silicone Gel Breast Implant Product Liability Litigation*), Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994); Henry Weinstein, *New Terms Offered in Breast Implant Cases*, L.A. TIMES, Oct. 3, 1995, at D1.

109. Both Judge Jack Weinstein and I have noted that in addition to cash, claimants in mass tort matters also seek some cathartic value in the process they desire. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995); Carrie Menkel-Meadow, *Ethics and Mass Tort Settlements: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1215-16 (1995).

IV. HOW MULTICULTURALISM (OR PLURALISM) CHALLENGES THE ADVERSARY SYSTEM

Recall that when we speak of the adversary system we say the "Anglo-American" adversary system.¹¹⁰ The inquisitorial system of civil law countries,¹¹¹ the mediation of Asian countries,¹¹² the dispute resolution processes of Native Americans,¹¹³ and the "moots" of some African cultures¹¹⁴ remind us that legal processes are culturally specific and chosen, not given. Here I want to explore, very controversially I am sure, the cultural assumptions of our adversary system as they operate both at the national and international level. Again, although I have neither sufficient time nor space to do a complete review of comparative legal systems,¹¹⁵ it is important to recognize that other systems may still have something to teach us. With our increased participation in international treaties and tribunals such as WTO¹¹⁶ and the Law of the Sea Treaty,¹¹⁷ the experience of dealing with multiple parties having different cultures and legal regimes has revealed that we will have to participate in

110. See generally LANDSMAN, *supra* note 31, *passim* (discussing the adversary system in terms of the Anglo-American legal tradition).

111. See *id.* at 50.

112. See Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, MEDIATION Q., Sept. 1983, at 4.

113. See MEDIATION Q., Summer 1993 (special Issue on Native American Dispute Resolution).

114. See Folberg, *supra* note 112, at 4-5.

115. See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985) (discussing civil law systems); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 554-87 (1973) (comparing criminal procedure in adversary and nonadversary systems) [hereinafter Damaska, *Evidentiary Barriers*]; Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (explaining the differences between common law and civil law countries by pointing to the different views on authority); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing German and American civil procedure); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967) (discussing the Chinese legal system).

116. See Marrakesh Agreement Establishing the World Trade Organization (WTO), Pub. L. No. 103-465, 108 Stat. 4809 (1994).

117. See United Nations Convention on the Law of the Sea, July 29, 1994, S. Treaty Doc. No. 103-39 (ratifying United Nations Convention of Dec. 10, 1982).

alternative—to us—forms of dispute resolution and culturally complex international cooperation.

Within our own borders multicultural concerns are revealed when immigrants from other systems either fear or will not use our system because they do not understand or trust it,¹¹⁸ or when it is alien to what they know. Although our dominant melting pot and assimilationist ideologies suggest that recent newcomers to our shores simply should acculturate themselves to our legal system as one of the few “all-American” institutions, I, instead, posit that we might do well to take the opportunity of reexamining our system for ethnocentric bias and try to imagine creating and utilizing other dispute resolution institutions. The very premises of our system—that “winning” is all and that harms suffered are monetized—may not be culturally congruent with the belief systems of all members of our society.

At its most disturbing and controversial moments, our legal system presents a malingering question of what commitment our own citizens have to a system that some perceive delivers only injustice. Many would argue that the structure of the adversary system, itself, is not the trouble but, rather, that the inequalities of resource distribution and access within the system have caused many disempowered groups to feel less committed to the legal system.¹¹⁹ Others would suggest that the adversary system and the expensive details of its use exacerbate any preex-

118. Lawyers working with immigrant groups in communities like Los Angeles have reported to me that some national groups, such as some South and Central Americans, will not use our adversary system because it is unfamiliar to them. They often carry with them distrust of official courts from perceptions about corrupt regimes in their native lands—are we any less corrupt? Obviously, access to courts and to lawyers plays a large role in this reluctance. Some lawyers and community groups, however, report that some national groups prefer to create their own community dispute resolution processes. JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* 69-94 (1983) (chronicling the continuation of American immigrant community dispute resolution development). Some cultures also reject our American commodification and monetization of disputing. In another recent example, an elderly Japanese man learned that he had been paid less than many of his inferiors. His Americanized children urged him to sue but he said he valued his dignity and the respect he had had in the workplace more than his desire for money or to make trouble. (Jan Dizard to Howard Gadlin, personal communication.)

119. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 109-46 (1992) (illustrating the impact of racism on African American perceptions of the legal system and profession).

isting social power differentials.¹²⁰

I think that the issue goes beyond access and resources within the process. As Patricia Williams so eloquently reminded us in her book, *Alchemy of Race and Rights*,¹²¹ some in our society—as a specific example, African-Americans—have been the “acted upon” in law, as objects of law—property in slave legacy—and did not historically participate in the creation of our legal process.¹²² As some have criticized our “science” for its exclusion of particular voices,¹²³ we must wonder what a more multicultural and integrated group of framers might have chosen for a process if it had been informed by a full representation of our varieties of immigrant cultures. Although it seems true that many cultures think in binary terms, take for example the Asian yin-yang conception, it is not so clear that the dichotomies or binarisms are arranged hierarchically in the same manner, or that binary thinking necessarily must structure legal culture. Chinese mediation, derived from Confucian principles, is designed to seek “harmony, not truth.”¹²⁴ I wonder what would result if we redefined our legal system to seek “problem-solving” as one of its goals rather than “truth-finding.”¹²⁵ Although we remain committed to detached and unbiased third-party “neu-

120. Did the “playing of the race card” result in a majority black jury’s acquittal of O.J. Simpson as a “pay back” for the majority white jury in the Rodney King beating case?

121. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

122. *Id.* at 216-21.

123. See HARDING, *supra* note 43.

124. The value of harmony is strongly criticized by those who seek to preserve our adversarial system in the face of encroachment by “dangerous” ADR methods. See, e.g., Laura Nader, *Controlling Processes in The Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (criticizing harmony ideology); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 535-38 (1986) (criticizing the ADR assumption that consensual settlements of disputes are preferable to adjudication). I call these critics “litigation romanticists.” See Menkel-Meadow, *supra* note 109, at 1182.

125. I can imagine huge outpourings of objections here—where are justice, punishment, and deterrence?—all of the articulated current goals of our legal system. I offer this example as simply an illustration of how we select our goals and how we could select others. I do not suggest that we solve problems by ignoring justice. Or, as Rodney King put it, why shouldn’t our legal system be constructed to help us “all just get along” in such a diverse world?

trals," other cultures value decision makers who understand and are enmeshed in the community and who have "wisdom" from experience.¹²⁶

I fear the adversary system and its contributions to the larger culture have hindered rather than helped race and ethnic relations¹²⁷ by polarizing discussion and by continuing to perpetuate their own form of bi-polar thinking. Third-party-imposed solutions seldom get at root-causes of conflicts or provide enduring solutions. Black/white race relations, as another binary construct, remain the paradigm for thinking about race, despite the growing multiplicity of race and ethnicities and diversification of our society and, slowly, of the legal profession itself.¹²⁸ In my view, we need to rethink ways to permit more voices, more stories, more complex versions of reality to inform us and to allow all people to express views that are not determined entirely by their "given" cultural identities. To that end, let me turn to some proposals for reform of the adversary system.

V. REFORMING THE ADVERSARY SYSTEM

I am torn at this point between choosing from the most incremental reform options, keeping the adversary system in its place

126. As a feminist, I am not endorsing the "wise elder" form of mediation found in many world-cultures because it tends to be paternalistic and exclusive of women. I am suggesting, however, that the principles informing such choices differ from ours and might be worth examining in some areas. Using "substantive expertise" in some forms of ADR—for example, mini-trials, arbitration, and mediation—reflects this desire for a knowledgeable (and perhaps "interested" or "biased") third-party neutral and further complicates the questions of ethics and conflicts of interest. See, e.g., *Poly Software Int'l Inc. v. Su*, 880 F. Supp. 1487, 1492-95 (D. Utah 1995) (discussing complications of applying conflicts rules when small groups of skilled lawyers—in this case, specializing in a relatively small area of the computer industry—act as both litigators and mediators).

127. So do Lani Guinier and Susan Sturm. They have looked for other ways to facilitate the study of race. See Guinier & Sturm, *supra* note 32.

128. I have, in other contexts, talked about the importance of diversifying the profession for purposes of broadening how we think about law and its solutions, as well as its practice. See Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

and thereby keeping most of my audience, and beginning with the most radical of proposals so that, in the end, you will happily adopt all of my more modest suggestions.

A. *Adversarialism Where It Is Appropriate*

Being something of a provocateur, I will start with a radical yet benign suggestion. Because the adversary system has not been validated empirically as the most effective legal system,¹²⁹ let us think about what it does best and attempt to cabin its influence to those cases needing the "full-court press" of adversarialism. Next, let's move on to thinking about what other processes might appropriately serve other goals.¹³⁰ Many of you will think that all criminal cases belong in the former category, where the state can threaten a lone individual's potential loss of freedom—I disagree.¹³¹ Others likely think that all disputes involving some "public question" belong in open court with fully contested arguments and rules designed to create fairness of process and result.¹³² Still others would include in the former category cases that involve large numbers of people, like the mass tort, consumer, and securities cases that we face. Yet more people suggest that we need adversarial, conventional processes precisely when the parties are unequal so that courts may police resource and "performativity" imbalances.¹³³ For me, the opera-

129. See THIBAUT & WALKER, *supra* note 59, at 6-21; Luban, *supra* note 1, at 83-122. But see Damaska, *Evidentiary Barriers*, *supra* note 115, at 578-89.

130. So much of the writing on the adversary system is done by those who imagine either a criminal or civil paradigm and then attempt to contrive and impose some universal system for both. Call me a postmodern, but I think enough variation in our case types already exists that neither process rules nor ethics rules can continue to be totally global and transsubstantive. See Menkel-Meadow, *supra* note 109, at 1188-201.

131. As William Simon controversially has suggested, it is not always true that state powers are superior to criminal defendants. See William H. Simon, *The Ethics of Criminal Defense*, 91 U. MICH. L. REV. 1703, 1707-13 (1993).

132. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-40 (1995) (discussing the arguments in favor of adjudication instead of settlement in terms of public good and public values); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 252-53 (1995) (comparing the fairness of ADR and adjudication).

133. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Preju-*

tive principles are party choice and use of the adversary system where it is most appropriate and always available—literally as a “court of last resort.”¹³⁴

B. Other Possible Forms of Dispute/Conflict Resolution

What I most want to think about, however, are other forms of legal dispute resolution. In what circumstances could we begin to experiment safely with other forms of process through which we could explore other forms of interaction and ethics? Many scholars in the dispute resolution field have called on us to provide both “thick description” and analysis of different modes of conflict resolution that have been successful, even in perceived intractable disputes.¹³⁵ Mindful of the postmodern and multicultural critiques of legal knowledge, could we imagine a forum where more than two voices could be heard? Here I will sketch some possible alternate modes of dispute resolution to consider.

When a dispute involves more than two sides, one could imagine processes with more than just plaintiffs and defendants as parties. In a modification of old historical forms, one could imagine a tri-partite criminal proceeding with states’ interests, victims’ interests, and defendants’ interests all represented. Or,

dice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359, 1367-75; Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984).

134. Lest you think that I am an ADR romanticist, I was involved recently as a plaintiff and counsel (with my husband) in three lawsuits (all after other forms of dispute resolution failed). After filing, two of the three settled. For the case-typologists among you, the collection and copyright infringement cases settled, the landlord-tenant—damages, not eviction—did not. By the way, we “won” the damage case, at least in the sense of getting a judgment; however, we have yet to collect a dime. The full trial that we had thus did nothing to increase the justice or efficacy of our claim.

135. See, e.g., DEBORAH KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS 491-92 (1994) (stating that we need to study and learn from disappointments, rather than bemoan them); MARC H. ROSS, THE MANAGEMENT OF CONFLICT: INTERPRETATIONS AND INTERESTS IN COMPARATIVE PERSPECTIVE (1993) (arguing that studying the psychocultural specifics of both successful and failed efforts is particularly important); CONFLICT, COOPERATION, AND JUSTICE, *supra* note 16 (discussing social psychology’s approach to issues of social unrest); see also DONALD A. SCHÖN & MARTIN REIN, FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES (1994) (examining the use of mediation-like processes in very difficult public policy issues).

as has occurred in a variety of environmental siting, community block-grants and other multiparty situations, one could utilize a multiparty mediation-like process in which a single dispute broadens community and democratic participation in a single issue that affects more than two parties and establishes a process for greater participation.¹³⁶ "Reg-neg"—regulatory negotiation or negotiated rule-making—represents another example of current recognition that processes other than conventional adversarial ones may more effectively involve more than two parties and lend greater legitimacy to the result if people get involved in the construction of rules before they take effect.¹³⁷ We could further adapt our current forms of subclasses, multiparty, multidistrict litigation, and other forms of consolidation to allow for participation by more than "two sides" in civil cases having a variety of private and public issues at stake.¹³⁸

In the Center in which I work at UCLA (the Center for Inter-racial/Inter-ethnic Conflict Resolution) we have begun to develop formats and fora for discussing divisive issues that attempt to alter the debate mode and focus instead on structured, reframed, multiparty "representational," and diverse conversation. In a recent forum at UCLA on affirmative action (a very disputed issue on my campus and in my state), for example, we organized a workshop designed to avoid adversarial and debate-like presentations. The process involved four diverse presenters, diverse in views, issues, and demographics,¹³⁹ who each briefly stated

136. See KOLB ET AL., *supra* note 135, at 309-54 (profiling Larry Susskind); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1989).

137. See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (discussing the history, advantages, and function of negotiating regulations); Lawrence Susskind & Gerald McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) (examining the results of Environmental Protection Agency evaluations of negotiated rulemaking).

138. For my argument that cases are not so easily denominated "public" or "private," see Carrie Menkel-Meadow, *Whose Dispute Is It, Anyway? A Democratic and Philosophical Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

139. The forum thereby illustrated both demographic and positional diversity. There were ranges of views on what kind of affirmative action was appropriate in the educational arena, including discussions of differences in admissions, educational programs, employment, and contracting; what groups should be part of such plans, and views that there should be no affirmative action at all. In a very "PC" environment, the latter view is not easy to openly express, but was accomplished because of the

their views on the subject of affirmative action including statements about how their personal and individual histories had affected their views. The speakers were then asked a series of probative questions by a moderator-facilitator. The questions that the moderator-facilitator asked purposefully probed more than adversarially stated extreme positions, such as: What are the grey areas in your thinking? What evidence would you need to change your mind? What did you learn from hearing the other presenters? The four presenters followed the moderator-facilitator's questions by questioning each other through the question-reframer-moderator who attempted to dislodge the personal attacks or hostility in questions and responses. Audience questioning followed the self-initiated questioning segment and the forum concluded with an attempt to draft a statement that reflected commonalities and differences of thinking and listed areas in which more information was required. All of this was followed by an audience-participant process-critique session.

I recognize that such a multilayered procedure might not work in cases calling for an assessment of civil damages or a determination of guilt. A multilayered procedure certainly may be used, however, for policy deliberations and in the negotiation and settlement of large multiparty lawsuits.¹⁴⁰ Lani Guinier and Susan Sturm at the University of Pennsylvania have experimented with similar and other formats in their class on race and gender theory, with similar purposes: to reduce the distortions of adversary dialogue in the hope that individuals would be empowered to fully confront their own and others' views without attachment to "side" or "identity."¹⁴¹ They label their class an "intermediate space" for discussion, conversation and dialogue,

process protections offered.

140. Indeed, with the exception of the representative-advocates of each "party," this structure is not that dissimilar from a multiparty, private mini-trial whereby the principals intend to complete the negotiation and resolve the dispute themselves. ERIC D. GREEN, CENTER FOR PUBLIC RESOURCES, THE CPR LEGAL PROGRAM MINITRIAL HANDBOOK (1982). If the audience participated in drafting the statement or agreement, we might have something that looked like a summary jury trial. See Thomas P. Lambros, *A Summary Jury Trial Primer*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE GUIDE 373 (John Wilkerson ed., 1990) [hereinafter DONOVAN LEISURE].

141. See Guinier & Sturm, *supra* note 32.

rather than debate.¹⁴² Similarly, I have called mediation an "intermediate" space¹⁴³ where individual disputants can meet outside of both more informal, for example, family or workplace, and formal, for example, court, settings. Intermediate spaces,¹⁴⁴ even without formal or complexly facilitated rules, may allow for more authentic grappling with issues and differences¹⁴⁵ and may even lower the stakes to some extent.¹⁴⁶ In such environments, as with privately negotiated settlements, we may arrive at contingent agreements, promises to meet and confer again, contingent performances, plans for the future without adjudication of the past—all illustrations of postmodern acceptance of some uncertainty and the need to combine past disputes with present and future action.

More conventionally, we might examine the circumstances under which some forms of the civil inquisitorial/investigative procedures make sense—their major advantage being that a nonpartisan investigation leads to, at least in theory, a genuine search for truth. Purporting to engage in a genuine search for truth may be appropriate for some governmental and regulatory questions. Furthermore, as long as individual liberty is not at issue, even the most confirmed adversarialist might acknowledge that the proverbial quest for "truth" is, ultimately, likely to be both more effective and cheaper.¹⁴⁷ Even the United Kingdom, with its commitment to the adversary system,

142. See *id.*

143. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *NEGOTIATION J.* 217, 241 (1995) (review essay).

144. Regarding "intermediate spaces," another personal favorite of mine is the bookstore reading. In a recent reading in Washington, D.C., Derrick Bell demonstrated the democratic power of such sites by engaging in conversation (after completing his reading), with a very diverse audience of people—young and old, black and white—who both supported and challenged his views (and his own position) on race relations as discussed in *BELL*, *supra* note 119.

145. Moreover, intermediate spaces, perhaps, come closer than any other setting to achieving Jurgen Habermas's "ideal speech conditions." See JURGEN HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION* (1987).

146. I often wonder how much the O.J. Simpson trial would have been different without the press coverage and play-by-play sports commentary.

147. Note that I do not suggest this in those circumstances as now used when a "neutral" court officer investigates something like parental fitness and makes recommendations to the court without adversary contestation.

employs governmental investigatory commissions and procedures far more often than we do.¹⁴⁸

I strongly believe that we are on the right track in experimenting and using a variety of forms of "alternative dispute resolution"—I prefer the new term "appropriate dispute resolution." Yet, I fear many of these forms (mediation, mini-trials, settlement conferences, early neutral evaluations, reg-neg) are becoming corrupted by the persistence of adversarial values.¹⁴⁹ Lawyers and third-party neutrals will clearly have to learn new roles to play in mediation. In recognition of this need, programs for teaching people to be effective problem solvers and, heaven forbid, advocates, within the ADR process are emerging. These fledgling programs are good, because dealing with the weaknesses of adversarialism necessitates new mind-sets about law practice.¹⁵⁰

Fact finding, third party neutraling, and judging might also deserve reconsideration. Some years ago, I suggested that if gender differences in judging and fact finding had any merit, the system might benefit if it considered using male-female judge teams, who had to decide together, instead of a single judge.¹⁵¹ Consider the changes required of both our judge and jury roles and selection processes if we are to reflect fully "multicultural" considerations in decision making and process facilitation.

Close to my heart, and related to the concept of accounting for multicultural considerations, is my concern regarding whether different forms of process will require different ethical requirements.¹⁵² Should lawyers attending an in-office, Early Neutral

148. See, e.g., THE ROYAL COMMISSION ON CRIMINAL JUSTICE, 1993, CMND 2263 (following investigation of several cases of "miscarriages" and false convictions in political trials). White papers and green papers on important legal issues affecting public policy are also good sources.

149. In comparison, other forms of "ADR" such as arbitration, summary jury, and bench trials are intended to be more conventionally adversarial. See Resnik, *supra* note 132, at 218-22.

150. See Marguerite Millhauser, *Gladiators and Conciliators: ADR—A Law Firm Staple*, 14 B. LEADER, Sept.-Oct. 1988, at 1, 30; Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEG. J. 29, 34-35 (1987).

151. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 59 (1985); see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1878 (1988).

152. See ROBERT A. BARUCH BUSH, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION,

Evaluation session with court-appointed volunteer lawyers¹⁵³ have a duty of candor to the tribunal under Model Rule of Professional Conduct 3.3? What conflicts of interests rules should we apply to those who both mediate and litigate?¹⁵⁴

C. *Reforming the Adversary System and Legal Ethics*

For those who think that it is not the structure of the adversary system, but the extremes of behavior within it that are the problem, I offer a not original list of potential procedural and ethical reforms, though I must admit that I am both cynical about policing efforts and skeptical that reforms will not themselves become the victims of the adversarial process much as we have seen with Rule 11 reforms¹⁵⁵ and are beginning to see with recent disclosure reforms.¹⁵⁶

So, if the excesses of adversarial behavior concern us we could prohibit the coaching of witnesses,¹⁵⁷ require earlier and more forthright disclosure of adverse, as well as favorable, facts and witnesses¹⁵⁸ and adverse legal authority¹⁵⁹ in both civil and criminal cases, require all lawyers, not just prosecutors to "do justice"¹⁶⁰ in lieu of only serving their clients' interests, prohib-

THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS (1992); Robert McKay, *Ethical Considerations in ADR*, in DONOVAN LEISURE, *supra* note 140, at 459-82; Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG., Sept. 1993, at 129.

153. This is the practice in the Northern District of California. See N.D. CAL. A.D.R. 5.

154. See *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995); Hazard, *supra* note 34; Menkel-Meadow, *Ancillary Practice*, *supra* note 34; Menkel-Meadow, *Conflicts*, *supra* note 34, at 5.

155. See, e.g., Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) (arguing that rather than assess the revisions to the Federal Rules of Civil Procedure in terms of winners and losers, critics should endorse a neutral rulemaking procedure).

156. See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"* 46 HASTINGS L.J. 679 (1995).

157. The question that remains, however, is who would police such a private activity. See White, *supra* note 13, for similar arguments about regulating private negotiation activity.

158. We are trying to do this, somewhat unsuccessfully, with reforms to Rule 26(a) of the Federal Rules of Civil Procedure. See Sorenson, *supra* note 156, at 729-60.

159. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1980).

160. See *id.* Rule 3.8.

it the cross-examination of witnesses "known" to the lawyer to be telling the truth and prohibit the presentation of any evidence at all "known" to be false by the attorney,¹⁶¹ and impose serious sanctions for violations of these rules. More radically, we could require equalization of resources of the advocates, either by taxing the wealthier litigant or by providing more public subsidies for poorer litigants; however, given our current reluctance to pay for free legal services for the poor and to enter into real fee-shifting arrangements (not to mention the socialist nature of this proposal), I doubt that we will ever come close to realizing this. I suspect, furthermore, that, even if we equalized economic resources, an inequality in raw, legal talent might *still* exist in many cases (it is the man [sic] and not the art, remember, who makes arguments).¹⁶² Should we assign lawyers to cases on a random or lottery basis?¹⁶³ Could we ever equalize advocacy skills¹⁶⁴ so that the "merits"—whatever those may be in a postmodern world—and not the performance drives the result?

Although I would certainly like to see abuses of adversarial behavior curbed (and I still think professional reputation does

161. These latter examples make adversarialists cringe. They raise the important issue of deciding when a lawyer may appropriately judge his own client, see DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973), and raise important epistemological concerns about how we "know" the truth; see, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (where a client claimed he had been denied a fair trial by his counsel's admonitions that he testify truthfully). If my postmodernist critiques apply to the truth-finding process of the adversary system, they would apply *a fortiori* to a client's own lawyer who often has nothing more to go on than a client or witness interview.

162. See *supra* note 82 and accompanying text.

163. Although, in principle, client choice of lawyer forms the basis of our legal system, we know that many exceptions to this premise exist in assigning public defenders and criminal and civil court appointed lawyers, in assigning lawyers in pre-paid legal plans, and even, for most of us when our liability insurance carriers provide our defense. With increasing use of managed care and health maintenance organizations in health delivery, many of us no longer have choice of our doctors—should lawyers be allocated any differently? When a lottery system of legal services was proposed some years ago for legal indigents, see Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281 (1980), I strongly opposed it on class terms. It might be different, however, if it were applied to all litigants.

164. Would we then be asking some lawyers to be "dumb and dumber" while we try to make others smart and smarter?

more to police this than anything else, interspersed with a few very public scandals¹⁶⁵ that cause us to reexamine our loyalties and rules once in a while),¹⁶⁶ I am skeptical that ethics rules changes can really reform the adversary system. Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it. Though some legal scholars have interpreted the Model Rules' language change from "zealous" advocacy¹⁶⁷ to "diligence"¹⁶⁸ to mean that the ethics rules have shifted somewhat away from adversarialism, I still see the loophole in the language of the comments—where zeal continues to rear its dragon-like smoke. No one, however, can point to any change in lawyers' behavior that has resulted from that language change. (Remember the deconstructionists' view about indeterminate language with no meaning!)

D. Objections and Responses: Conclusion

Although I seem to have come to bury the adversary system, I recognize that it has its value and there are likely to be a number of objections to my criticisms and proposals.¹⁶⁹ As a former trial lawyer and continuing reluctant adversarialist¹⁷⁰ I will

165. Such as the involvement of the law firm Kaye, Scholer, Fierman, Hays & Handler in the Lincoln Savings and Loan scandal. See George H. Brown, *Financial Institution Lawyers As Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637 (1994) (discussing the role of lawyers in the collapse of savings and loans); Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985 (1993) (discussing the role of the Kaye, Scholer law firm in the savings and loans scandal).

166. Other participants in the W.M. Keck Foundation Forum on the Teaching of Legal Ethics, published in this issue of the *William & Mary Law Review*, have explored the specific issues entailed in whistleblowing on one's own client and the implications for client confidentiality and loyalty. See, e.g., John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 51 (1996) (discussing the attorney's duty to disclose client fraud to the tribunal).

167. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980).

168. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

169. See Dzienkowski, *supra* note 166, *passim*; Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, *passim* (1996).

170. I usually refuse speaking engagements styled in debate mode; I refuse all offers to be an expert witness in legal malpractice or professional responsibility cases; I no longer teach Trial Advocacy; I mediate and arbitrate, but, as anyone who knows me will say, I can still argue and become quite adversarial.

canvas a few objections and attempt to respond to them.

Some will say the lady doth protest too much—indeed there is not *enough* of an adversary system left today—an argument I suspect Monroe Freedman will make. With the high settlement rates and large number of plea bargains,¹⁷¹ too few cases ever see the full test of the adversary system at its best. At another level, critics like Gary Bellow and Judith Resnik suggest that a hybrid form of process—a bureaucratic form of process—exists, both in and out of courts, where an increase of judicial and administrative management of cases exists or where, even in court, judges apply more discretionary, bureaucratic rules and continue to push the parties toward settlement.¹⁷² Others suggest that all of the attempts to cure the ills of civil litigation—using ADR, Rule 11, disclosure rules, and civility rules—will destroy the criminal justice system in cases where the client needs a fully armed advocate.¹⁷³ Most telling to me is the fear that if we tame the adversarial dragon too much, even in civil cases, our expensive and tedious discovery process will not turn out the occasional jewel of achievement in locating that famous “smoking memo” that informs the rest of us of serious wrongdoing.¹⁷⁴

In addition, although I have labored long and hard to canvas the faults of the adversary system, we know that any system that we might substitute for it would have other, perhaps worse, flaws for those who fear the power of state investigators, or the absence of clear standards or governing rules in private dispute

171. Plea bargains are rapidly decreasing in states like California having “three strikes and you’re out” laws. It is estimated that soon all of the 591 courts in the County of Los Angeles will be occupied with criminal cases in which third time offenders can no longer plea bargain. There may be no civil adversary system left if full trial is contemplated. See Stephanie Simon, *Civil Courts Also Feel Squeeze of ‘3 Strikes’ Cases*, L.A. TIMES, Aug. 13, 1995, at A1.

172. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 403-14 (1982). Gary Bellow made this suggestion in a personal communication with the author in March 1995.

173. See Silver, *supra* note 11, at 887.

174. The Pinto case, see *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981), the asbestos litigation, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL*, (1985), the Dalkon Shield litigation, see RICHARD B. SOBEL, *BENDING THE LAW* (1991), and now the tobacco cases, see, e.g., *RJR Nabisco Holdings Corps. v. Dunn*, 657 N.E.2d 1220 (Ind. 1995), are examples of these triumphs of our adversary system.

resolution processes. I often teach about the role of the lawyer in the adversary system by looking at the historical cycles in which the juvenile justice system has turned.¹⁷⁵ What began as a more private, benevolent, but paternalistic system, without adversary protections, was converted during the "Due Process Revolution" to include virtually the full panoply of adult adversarial adjudication techniques and protection that we witness today.¹⁷⁶ Most recently, with the advent of ADR and more sophisticated or simply different psychological models, we have again moved closer to more flexible, private, individualized settlements and treatment programs—although now the juvenile at least has a lawyer. A similar story can be told with respect to some government benefit programs and adjudicatory and administrative decision making. Process itself is therefore subject to the same "paradigm shifts"—or trends, or fads—as other intellectual frameworks. (You can see this is coming to a postmodern conclusion.)

Thus, although I am not happy with the structural, epistemological, remedial, and behavioral aspects of the adversarial system, I am skeptical that we can reform it by changing some ethical or procedural rules. A cultural change is required, and that is not easy to legislate. What I urge instead is the cabining of the adversarial system to the situations where it can do its best work, with all the limitations I have described. I would prefer that we take the teachings of postmodernism and multiculturalism seriously enough to consider other forms and formats of conflict and dispute resolution—such as employing many-personed and -sided factual presentations and handling disputes with more deliberative and participatory party and fact-finding processes—and begin to evaluate their strengths and weaknesses as we come to develop something of a typology for assessing which cases belong in which ADR process.¹⁷⁷ I be-

175. I rely upon MURRAY SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* (2d ed. 1985), which raises questions about the value of the adversary system, starting with the *Gault* decision. See *In re Gault*, 387 U.S. 1 (1967).

176. See AUERBACH, *supra* note 16, at 126-27.

177. See, e.g., Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49 (1994) (explaining how to determine which ADR procedure, if any, best suits a par-

lieve that each process will need to carry its own ethics—the zeal of the advocate does not play well in mediation and the mediator is both more active and more complex a third-party neutral than the judge who is governed by the Judicial Code of Conduct.¹⁷⁸ To take up a more radical strain of postmodernism, our legal processes and ethics are “in play” (or, in the French, “at play”). Our experimentation with ADR and other forms of legal process reflects our collective dissatisfaction, for a wide diversity of reasons, with the traditional adversary model and our current postmodern penchant for “many methods,” when one will not suffice. I firmly believe that the only way to reform the adversary model is to successfully “oppose” it with other modes and processes and see if we can create a more varied legal system, one that is more sensitive to the particular postmodern needs of parties and the particularities of cases. I do not think that any one micro-reform or any single process will successfully supplant and replace the adversary system. I hope, however, that the post-postmodern legal system will give parties a greater choice about how they want to resolve their disputes. Greater choice in dispute resolution will allow lawyers who want to be “moral activists,”¹⁷⁹ problem solvers,¹⁸⁰ lawyers for the situation¹⁸¹ or the community,¹⁸² discretionary lawyers,¹⁸³ civic republicans,¹⁸⁴ or statesmen¹⁸⁵ [sic] to have greater flexibility

ticular dispute).

178. At least one judge, Judge Weinstein, has applied the conflict standards of the Judicial Code of Conduct to a court-appointed mediator-special master. See *In re Joint E. & S. Dist. Asbestos Litig.*, 737 F. Supp. 735 (E. & S.D. N.Y. 1990) (discussing the ethics of Ken Feinberg).

179. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160-61 (1988).

180. Menkel-Meadow, *supra* note 100.

181. Geoffrey C. Hazard, Jr., *Dimensions of Ethical Responsibility: Relevant Others*, 54 U. PITT. L. REV. 965 (1993); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis As People's Lawyer*, 105 YALE L.J. 1445 (1996); Monroe Freedman, *Brandeis' Lawyer for the Situation*, LEGAL TIMES, Apr. 1, 1996, at 21.

182. THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991).

183. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

184. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230 (Raymon L. Solomon et al. eds., 1992).

185. ANTHONY KRONMAN, *THE LOST LAWYER* (1994).

in the models they choose. Not everyone will have to be a “hired gun” in an epistemological system that is crumbling as we speak.